IN THE

Supreme Court of the United States

October Term, 1945

No. 490

M. E. HEISER,

Petitioner,

vs.

WILLIE MAE WOODRUFF, HOWARD L. WOODRUFF, MARGUERITE B. WOODRUFF, LEONARD J. WOODRUFF, JR., IDA BELL WOODRUFF, and LEONARD J. WOODRUFF,

Respondents.

Brief of Petitioner, M. E. Heiser on Writ of Certiorari to the United States Circuit Court of Appeals, for the Tenth Circuit.

LEONARD J. MEYBERG,
208 West Eight Street, Los Angeles 14,
Counsel for Petitioner,

RUPERT B. TURNBULL,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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PETITIONER'S BRIEF.

Opinions Below.

For logical sequence we give the opinions of the Courts below as follows, in this order printed in full in the Appendix to this brief:

1. The opinion of the Honorable Eugene Rice, United States District Judge for the Eastern District of Oklahoma, dated the 23rd day of June 1944, in which opinion the District Judge reversed the Referee in Bankruptcy with reference to the Heiser judgment claim.

2. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, in Jackson, Trustee in Bankruptcy of the *Estate of L. J. Woodruff, Bankrupt*, and *L. J. Woodruff v. M. E. Heiser*, re-

ported in 111 Fed. (2d) 310, which judgment is printed in full in the Appendix to this brief.

3. The majority opinion of the United States Circuit Court of Appeals for the Tenth Circuit, which is printed in full in the Appendix to this brief.

4. The dissenting and minority opinion of the United States Circuit Court of Appeals for the Tenth Circuit (Justice Huxman), which is printed in full in the Appendix to this brief.

5. Order and Stipulation in the United States District Court for the Southern District of California dated June 8, 1939, printed in full in the Appendix to this brief.

Statement Disclosing Basis of Jurisdiction.

1. Jurisdiction is invoked under Sec. 240 of the Judicial Code, as amended in 28 U. S. C. A. 347, and the Act of February 13, 1925, Chapter 229, 43 Stat. 9365, Sec. 240a, amended May 22, 1939, and under Sec. 237 b as amended by Act of February 13, 1925 (43 Stat. 937).

2. Judgment of the United States Circuit Court of Appeals for the Tenth Circuit was entered on August 11, 1945. The petition for rehearing was filed by M. E. Heiser within the time allowed therefor by rule of court and an order denying said petition for rehearing was entered on September 4, 1945. An application for a writ of certiorari was presented October 5, 1945, pursuant to paragraph 5(b) of the rules of the Supreme Court of the United States, and was granted.

3. The questions sought to be determined in the United States Circuit Court of Appeals for the Tenth Circuit were the same legal questions previously determined in a proceeding between the same parties and previously determined by the United States Circuit Court of Appeals for the Ninth Circuit in their case No. 9356, reported in 111 Fed. (2d) 310; the decision of the United States Circuit Court of Appeals for the Tenth Circuit being in conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit on the same matter and issues and between the same parties.

4. The cause sought to be reviewed herein involves the decision of an important question of *res judicata* and its application; it involves the question as to whether or not "full faith and credit" should be given judgments of United States District Courts and United States Circuit Courts of appeal by courts of equal jurisdiction upon the same issues and between the same parties; it involves an unprecedented opinion of a United States Circuit Court of Appeals which presents a new theory authorizing a collateral attack upon a judgment in equity proceedings and in bankruptcy based upon a general charge of intrinsic fraud; and it involves the decision of an important question of local law in a way in conflict with applicable local decisions, and the decision of an important question of federal law extending the principle of the case of *Pepper v. Litton* (308 U. S. 295), which has not been, but should be settled by the Supreme Court of the United States.

Questions Presented.

Point I.

Should the United States District Court of Oklahoma give "full faith and credit" to a final judgment of the United States District Court of California, affirmed by the Ninth Circuit Court of Appeals, against a trustee in bankruptcy and the bankrupt, and thereby preclude relitigation by a referee in bankruptcy, on the merits, of the same subject matter of such final judgment against the trustee?

Point II.

Is a judgment of the United States District Court of California, affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, which has become final (wherein such Circuit Court decision holds that an independent equity action brought by a trustee in bankruptcy from Oklahoma in an effort to set aside the said final judgment for alleged fraud in its procurement is without merit)—*res judicata* as to that subject matter and binding upon the United States District Court of Oklahoma, in the presence of a well grounded plea of *res judicata*, to preclude the retrial of the same issues before the referee in bankruptcy in the Oklahoma bankruptcy proceeding?

Point III.

After a final judgment of (1) a United States District Court and (2) a final judgment of a United States Circuit Court of Appeals affirming it—both rendered on the same identical subject matter, *viz.*, allegations of fraud and perjury in the procurement of a judgment, and in the presence

of a well grounded plea of *res judicata*, may a referee in bankruptcy, under the guise of "examining the underlying claim," ignore the doctrines of *res judicata*, estoppel by judgment and "full faith and credit," and reverse the final judgment by a trial of the merits?

Point IV.

May an Oklahoma referee in bankruptcy try again, issues on the merits (and in the presence of a well grounded plea of *res judicata*), involving questions of fraud and perjury alleged to have been used in procuring a final judgment against the bankrupt and after creditors in bankruptcy, by their trustee upon order of the referee had theretofore selected a California forum to litigate the same questions of fraud and perjury as affecting the same final judgment in issue, and judgment was rendered against the trustee, with adverse final decisions by the United States District Court of California and by the United States Circuit Court of Appeals for the Ninth Circuit?

Point V.

May a referee in bankruptcy relitigate a question of intrinsic fraud and be allowed the opportunity of virtually reversing a final decision of a United States District Court and a United States Circuit Court of Appeals affirming it, after a trustee in bankruptcy and the bankrupt, acting under a written order of the referee in Oklahoma, had selected the federal courts in California (both District and Ninth Circuit) as the forum to litigate questions of fraud as grounds to vacate and set aside and test the validity of a final judgment of a California Federal court and there suffered adverse decisions in both federal courts?

Point VI.

Is it the intent and purpose of the Bankruptcy Act to afford a means (without charging extrinsic fraud) whereby a bankrupt and/or his creditors may avail themselves of the Bankruptcy Act to accomplish a result, the subject matter of which had proceeded to final judgment against the bankrupt prior to the adjudication of bankruptcy, and thereafter against the trustee in bankruptcy in courts having jurisdiction thereof, and concerning which no other or different result could have been accomplished without resort to the Bankruptcy Act?

Point VII.

Is a final judgment of the United States District Court for Southern California against a trustee in bankruptcy, in an independent action filed by him to test the validity of a judgment theretofore rendered by the same court against the bankrupt prior to the bankruptcy proceedings, *res judicata* as to all matters placed in issue by the trustee and/or litigated therein, and/or which could have been litigated therein by the trustee?

Point VIII.

After a judgment rendered by a United States District Court of California and affirmed by a United States Circuit Court of Appeals, in independent equity proceedings by a trustee in bankruptcy attacking for fraud the validity of a final judgment previously rendered against the bankrupt, can the same charges of intrinsic fraud alleged in obtaining the original judgment again be subsequently litigated before the referee in bankruptcy; or is the trustee bound to present and prove in the equity proceeding

every available ground of fraud of which he has knowledge or belief? Or, having charged fraud in such equity proceeding, which fraud was denied and not proved, can the trustee "apparently abandon" the charges that the material allegations in the original complaint upon which the previous judgment was rendered, were knowingly false, that such judgment was secured through the use of perjured testimony given by the plaintiff and that a fraud was thus committed upon the court, and then after his equity proceeding is determined against him by the court which rendered the original judgment, and that judgment affirmed on his appeal to the Circuit Court, can these same charges of intrinsic fraud in obtaining the original judgment be subsequently litigated again before the referee?

Point IX.

In an appeal to the United States Circuit Court of Appeals, are findings of a United States District Court on a Writ of Review from an order of a referee disallowing a claim based upon a final judgment of the United States District Court necessary, where the findings of the referee contained in his certificate on review are before the Circuit Court of Appeals, and showing (a) that the same issues were theretofore presented by the trustee in bankruptcy in an independent action filed by the trustee before the United States District Court that rendered said final judgment; (b) that said action was determined against the trustee and, upon his appeal, judgment was affirmed by the United States Circuit Court of Appeals; and (c) that a well grounded plea of *res judicata* setting forth said judgment was timely presented to such referee and denied by him?

Statement of the Case.

Prior to the Voluntary Bankruptcy proceeding of Leonard J. Woodruff in Oklahoma, the United States District Court for Southern District of California rendered a judgment of $278,631.71 against Woodruff, in favor of Heiser. Nine days after the entry, Woodruff appeared and moved to vacate the judgment on the ground (among others) that it had been procured by fraud and perjury as to values of the gems the Court had found in his judgment Woodruff had defrauded Heiser of. Woodruff without waiving his right to appeal stipulated [Appendix, No. 5, p. 26; R. Vol. I, p. 263] with plaintiff Heiser that the Court should hear evidence to determine if the values alleged in the complaint and contained in the judgment were right or wrong. In the same stipulation Heiser waived other damages. The trial under the stipulation and order of the Court pursuant thereto started June 12, and ended June 29. Evidence was introduced by plaintiff and defendant, many witnesses examined and many exhibits produced. Woodruff was represented by three attorneys, Ames Petersen, Robt. Beveridge and Edward Fitzpatrick. When the matter was submitted the trial court found the values were as represented in the complaint and refused to set aside the judgment. The judgment became final. Woodruff thereafter, on July 5, filed voluntary bankruptcy petition in Oklahoma and was forthwith adjudicated. A trustee, Jackson, was elected by creditors:—all creditors (excepting Heiser) filed written petition alleging that the California judgment was obtained by fraud and perjury, asking the Referee in Oklahoma to authorize and instruct the trustee to go to California and attack the judgment. [R. Vol. I, p. 20.] The trustee, Jackson, also in a separate petition, asked the same au-

thority and to employ counsel for that purpose. [R. Vol. I, p. 21.] On these petitions the Referee ordered such action taken. [R. Vol. I, p. 28.] The trustee, Jackson, joined by the bankrupt Woodruff then filed in the California District Court charging fraud in the procurement of the judgment, perjury as to the value of the gems converted by Woodruff and many other grounds set up in the pleadings and affidavits. Heiser denied the charges. The District Court heard and denied the relief. Trustee Jackson and Woodruff (after the trustee had sought and obtained further order of the Referee authorizing the same [R. Vol. I, p. .....]) appealed to the United States Circuit Court for the Ninth Circuit at San Francisco. The decision of that Court is found in its unanimous opinion printed in full in the Appendix hereto at page 11 and in the Transcript of Record Vol. I, p. 291. The case citation is 111 F. (2d) 310. The Ninth Circuit Court decided against trustee Jackson and Woodruff in every respect and on all issues and affirmed the judgment of the District Court. The judgment became final.

After the judgment so became final, the same identical charges, in the same words and identical worded phrases appearing in the affidavits and pleadings were filed as objections to the allowance of the Heiser judgment as a filed claim before the Oklahoma Referee. Heiser answered the objections by pleading, *res judicata* by reason of the California Federal Court decisions, estopped by judgments, and "full faith and credit".

While the Referee ignored these defenses, and retried the matter on its merits, the judgment creditor Heiser refused to rely on the merits and stood on his final judgments. The Referee denied the Heiser claim. [Appendix p. 29; R. Vol. I, p. 148.]

On a review of the Referee's findings the District Court of Eastern Oklahoma, reversed the Referee and allowed the Heiser claim. The basis of that decision on the "Claim of Heiser" is best stated by Judge Rice himself, in his findings and opinion [R. Vol. I, p. 156] which we have reprinted in the Appendix hereto at page 2.

From that decision of Judge Rice an appeal was taken by the bankrupt Woodruff and certain family creditors. The Tenth Circuit does not agree with the District Court or the Ninth Circuit Court, and by the 2 to 1 decision lays down the law of the case [R. Vol. II, p. 1243; Appendix p. 16]. The dissenting opinion of Justice Huxman, also printed in the Appendix hereto [p. 21], agrees with the opinion and findings of Judge Rice of the Oklahoma District Court and with the opinion of the Ninth Circuit.

While sending the case back to the District Court for findings, this majority opinion of the Tenth Circuit Court if allowed to remain as the law of the case would afford no protection whatever and wholly nullify the Heiser California judgments against the trustee Jackson and Woodruff.

Further essential facts of the case are stated in the opinions, decisions and order attached to this brief as an Appendix; and in the interest of brevity are not repeated.

The reasons relied upon briefly stated are:

(1) The Ninth Circuit Court has held that the action of the Oklahoma trustee, Jackson, in attacking the California judgment in the United States District Court in California was "an independent action" in equity to set aside the judgment on the charge and claimed ground

"that the judgment was obtained by fraud" and that "the charge that the judgment was obtained by fraud was denied and not proved." The appeal was decided adversely to the contentions of the trustee Jackson and the bankrupt and affirmed the judgment of the District Court against them both. The decision became final. (Citation of case *Jackson v. Heiser*, 111 F. (2d) 310. [R. Vol. I, p. 291; Appendix hereto, p. 11.]

A litigant may not plead his grounds and try part only; may not reserve to himself part for future litigation. A final judgment is *res judicata* of that which was decided or could have been decided in that action. The dissenting opinion of Justice Huxman in the Tenth Circuit, points out clearly the law in this regard in conflict with the theory of the majority opinion of Justice Bratton in this case. [R. Vol. II, p. 1243.] Also printed in full in the Appendix hereto, p. 16.]

(2) The question of fraud in the procurement of the California judgment was in issue and had already been decided twice in final judgments adversely to bankrupt and his trustee Jackson, before the Referee in Bankruptcy attempted to retry it on the merits. Justice Huxman states our position clearly in the third paragraph of his dissenting opinion.

(3) The majority opinion herein sought to be reversed, if allowed to be the law of the case, permits a Referee to allow a trustee to select a forum and raise all points involved and when the final decisions are adverse to the bankruptcy trustee, and the estate, to then ignore the final decisions and reverse the United States District Court for Southern California, and reverse the Circuit Court of Appeals for the Ninth Circuit.

(4) The majority opinion of the Tenth Circuit if permitted to stand establishes as law that even when well pleaded the defenses of "full faith and credit;" "estoppel by judgment" and "*res judicata*" based upon final judgments of the United States District Court and its Circuit Court of Appeals may be ignored by a Referee in Bankruptcy.

(5) The majority opinion of the Tenth Circuit herein sought to be reversed places an extended construction on *Pepper v. Litton*, 308 U. S. 295, and wrongfully holds that under that decision a Referee in Bankruptcy may under the guise of "examining the underlying claim" retry the merits of a judgment final in its scope against the trustee and the bankrupt as to "debt" and "fraud and perjury used in its procurement."

(6) The bankrupt attacked the judgment after its rendition and before bankruptcy—the trial court, the United States District Court in California permitted evidence to be taken in an adverse hearing from June 12 to June 29 to determine if he had given a judgment by being deceived as to values. After this extended adverse hearing this Court held that he would not disturb the judgment, that he had not been imposed upon and that the values shown were the same as alleged in the complaint and as shown to him on rendering of the judgment. He refused to set it aside and so ordered.

After bankruptcy, which voluntary proceeding followed immediately after this order, the trustee Jackson and the bankrupt jointly attacked the judgment and order,—this time under express written orders of the Referee in

Oklahoma on the application of the creditors and trustee. The decision, being again adverse, was on appeal to the Ninth Circuit by the trustee and bankrupt, affirmed and became final. The Referee under the opinion before this Court may ignore these final judgments against his trustee and permit the same creditors, who joined in the application for the orders, to again litigate before him the very same issues, notwithstanding the defenses of *res judicata*, estopped by judgment, and "full faith and credit," were well pleaded before him.

Specification of Errors.

The Circuit Court of Appeals for the Tenth Circuit erred:

(1) In holding that a final judgment of the United States District Court of California affirmed by the Circuit Court of Appeals for the Ninth Circuit between the same parties (*Jackson, Trustee v. Heiser*) on the same subject matter was not *res judicata* as to specific frauds alleged but not proved by the losing party (Trustee Jackson).

(2) In holding that a Referee in Bankruptcy may reverse the final judgment of the District Court of the United States and of the Ninth Circuit in affirming it, rendered against his Trustee in Bankruptcy on questions of intrinsic fraud alleged to have been perpetrated in the procurement of said District Court judgment.

(3) In holding that after a Trustee in Bankruptcy has selected a forum to try his contentions that a given

creditor's judgment had been procured by fraud and perjury and had suffered adverse final judgments against him on these subjects in said court, the Ninth Circuit, that the Referee in Bankruptcy could again relitigate same subjects and reverse final judgment of Ninth Circuit.

(4) In holding that after litigants (Trustee and Bankrupt) had expressly attacked a final judgment for alleged fraud and perjury in its procurement, that they could abandon one or more grounds, leave them for future litigation, and not be bound by the rule of *res adjudicata* or estoppel by judgment when the decision went against the litigating Trustee and Bankrupt and in favor of the judgment creditor.

(5) In holding that the decision of the Ninth Circuit, holding that the proceeding before it was an independent equity action attacking a final judgment for fraud in its procurement and that there was no fraud proven or found, is not entitled to "full faith and credit" in the District Courts of the Tenth Circuit.

(6) In holding that *Pepper v. Litton* is authority for a Referee in Bankruptcy to ignore a final judgment as *res adjudicata*—when validity of judgment has been attacked unsuccessfully by the Trustee in Bankruptcy on alleged grounds of fraud in its procurement.

Petitioner respectfully represents that said questions properly appear in the record and were raised before the trial court (Referee) and the United States District Court (on Writ of Review), and in the Circuit Court of Appeals.

Summary of Argument.

A. RES JUDICATA.

B. THE JUDGMENT OF THE U. S. CIRCUIT COURT FOR THE NINTH CIRCUIT AGAINST THE TRUSTEE IN BANKRUPTCY, AFFIRMING THE JUDGMENT OF THE U. S. DISTRICT COURT AT LOS ANGELES, WAS RES JUDICATA AS TO ALL MATTERS ACTUALLY LITIGATED OR WHICH MIGHT HAVE BEEN LITIGATED THEREIN.

C. INTRINSIC AND EXTRINSIC FRAUD.

D. FULL FAITH AND CREDIT.

E. THE ATTACK BY THE CREDITORS, THROUGH THE TRUSTEE IN BANKRUPTCY, UPON THE FINAL JUDGMENT OF HEISER AGAINST WOODRUFF, THE BANKRUPT, WAS A COLLATERAL ATTACK.

F. THE TRUSTEE REPRESENTS ALL CREDITORS AND THEY ARE BOUND BY HIS ACTION AND BY THE JUDGMENT AGAINST HIM.

G. A FINAL JUDGMENT CANNOT BE ATTACKED FOR ALLEGED PERJURY IN ITS PROCUREMENT, OR ON THE CHARGE THAT ALLEGATIONS OF THE COMPLAINT WERE KNOWINGLY FALSE.

Argument.

A. Res Judicata.

We respectfully submit that on the question of *res judicata*, the opinion of the Honorable Judge Eugene Rice of the United States District Court at Oklahoma, on review of the referee's findings, clearly states the sound rule of law announced by this Honorable Court applying to the facts in this case. That opinion is set out in full in the Appendix hereto as No. 1 at page 2, and it appears in the Transcript of Record in Volume I at pages 156, 157 and 158. The same is true of the dissenting opinion of the Honorable Judge Huxman of the United States Circuit Court of Appeals for the Tenth Circuit, which appears in the Appendix hereto as No. 4 at page 21, and also in Vol. II of the Transcript of Record at page 1243.

We adopt the citations and quotations from the decisions set out in the foregoing opinions, namely the Honorable Judge Rice of the U. S. District Court of Oklahoma and the dissenting opinion of the Honorable Judge Huxman of the U. S. Circuit Court of Appeals for the Tenth Circuit, and particularly on the subjects of *res judicata* and the principles governing intrinsic fraud. We submit that these rules of law apply in bankruptcy courts as well as all courts of equity.

The doctrine of *res judicata* is not a technical defense. It is a rule of fundamental and substantial justice, of public policy and of peace, and must be enforced by the courts. (*Hart Steel Co. v. R. R. Supply*, 244 U. S. 294, 299; *Sun Indemnity v. U. S.*, 91 Fed. (2d) 120, 121; *U. S. v. U. S. Fidelity & Guaranty Co.*, 106 Fed. (2d) 804, 809; *Bryan v. Hamrick*, 102 Fed. (2d) 145, 152.)

In the case of *Beneficial Loan Co. v. Noble*, 129 Fed. (2d) 425, the United States Circuit Court of Appeals for the Tenth Circuit, in reversing the United States District Court which permitted an attack on the final judgment of a Colorado State Court, after discussing the case of *Pepper v. Litton*, 308 U. S. 295, said:

> "Here, however, the bankruptcy court did not undertake to exercise its jurisdiction with respect to the allowance, rejection, or subordination of a claim, but undertook to inquire into the merits of the cause of action . . . that is to say, it undertook to relitigate the matters which had been held and determined by the state court. This, we think, it was precluded from doing under the doctrine of *res judicata*."

In that case the court cited *Beebe v. O'Reilly*, 124 Fed. (2d) 750, which was decided on the authority of *Stoll v. Gottlich*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104.

The same Tenth Circuit Court, in a unanimous opinion written by Honorable Justice Bratton in the case of *Brady, et al., v. Beams, et al.*, 132 Fed. (2d) 985, stated at page 986:

> "A United States Court sitting in equity may vacate and set aside a judgment for fraud which was extrinsic or collateral to the matter tried but not for fraud which was in issue in the former suit." (Citing *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, on *res judicata*.)

The same Tenth Circuit Court, in its mapority opinion written by the same judge in the case at bar, now rules in conflict, we submit, with its own decisions and, with the accepted decision of every other circuit. It now holds that,— notwithstanding that the trustee in bankruptcy

suffered judgment against him in an independent action in the United States District Court at Los Angeles to vacate and set aside a judgment for fraud and to test the validity of the original judgment, and which judgment was also held valid by the Ninth Circuit Court on an appeal by the trustee—the same creditors, upon whose application the referee ordered the trustee [No. 7, App. p. 37; R. Vol. I, p. 28] to make those proceedings in that forum, may now relitigate the matters which had been heard and determined by the United States District Court at Los Angeles at the time of the rendition of the original judgment and the proceedings subsequent thereto by the bankrupt. Not only would the Tenth Circuit opinion now permit the relitigation of these matters already adjudicated, but it sanctions the relitigation thereof notwithstanding, and in direct conflict with the separate judgment against the trustee in the United States District Court at Los Angeles in his separate attack on the original judgment in his independent action, and in direct conflict with the judgment of the United States Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court of California against the trustee upon his appeal from the judgment of the said District Court. In these proceedings the bankrupt joined with the trustee and suffered the same determination.

After all these proceedings and these judgments the Tenth Circuit Court majority opinion now holds that subsequent thereto these same creditors who applied for the order of the referee which directed the trustee to conduct these proceedings against the Heiser judgment and claim at the expense of the bankrupt estate (Appendix No. 7, p. 37) may again relitigate before the referee the

charges of these creditors as to intrinsic fraud, that "the through the use of perjured testimony given by Heiser and that a fraud was thus committed on the court and the parties."

We submit that the trustee Jackson was acting for all of the creditors of the estate of the bankrupt Woodruff in these proceedings ordered by the referee on the application of these creditors, and that the determination of such proceedings adverse to him by the United States District Court at California and on appeal by the United States Circuit Court for the Ninth Circuit constitutes *res judicata* before the referee and the United States District Court in Oklahoma and the Tenth Circuit Court and protects the judgment against collateral attack on all grounds charged or which could have been charged in such proceedings, including both extrinsic and intrinsic fraud which were in issue under the general charge of fraud, denied and not proved as held by the California courts.

B. The Judgment of the United States Circuit Court for the Ninth Circuit Against the Trustee in Bankruptcy, Affirming the Judgment of the United States District Court at Los Angeles, Was Res Judicata As to All Matters Actually Litigated or Which Might Have Been Litigated Therein.

The United States Circuit Court of Appeals for the Tenth Circuit decided the case of *Moffett v. Robbins*, 81 F. (2d) 931. The decision was written by the Honorable Justice Bratton who also wrote the majority opinion in the case at bar. Therein Justice Bratton again sets forth the rule of law which we submit is the prevailing rule throughout all of the circuits of the United States Courts but which he reverses in the case

at bar. In that case it was held that a judgment rendered by a court having jurisdiction is conclusive upon the parties and their privies in a subsequent action in the same cause of action as to all matters actually litigated or which might have been litigated therein, and this, notwithstanding that the judgment may have been erroneous in fact or in law.

This Honorable Court held in the case of *Werlein v. New Orleans*, 177 U. S. 390, 398, 20 Supreme Court 682, 44 L. Ed. 871:

> "In the National courts an adjudication is conclusive of all questions of both law and fact upon which the rights of the parties depend, of things which might have been determined as well as those which were."

The rule is well stated in Freeman on Judgments, 5th Ed., Vol. II, pages 1437 and 1438:

> "A single cause of action may have been based on several grounds, in which event, whether actually litigated or not they are all merged in the judgment which bars a new action for the same cause of action though on a different ground from the first."

C. Intrinsic and Extrinsic Fraud.

We have briefed fully the cases of intrinsic and extrinsic fraud, and the holdings of the Supreme Courts of California and Oklahoma with regard thereto, in a petition for rehearing which is set forth in full, with the brief thereon, in the Transcript of Record, Volume II, pages 1253 to 1291. For sake of brevity we do not repeat the discussions set out therein except to call this Honorable Court's attention to the fact that the majority opinion of the Tenth Circuit Court, in the case at bar, permits re-

litigation before the referee of charges of intrinsic fraud, viz.,

> "that the material allegations in the complaint were knowingly false, that the judgment was secured through the use of perjured testimony given by Heiser and that a fraud was thus committed on the court and the parties."

Under the guise of examining the underlying claim, after the independent proceedings had by the trustee in the United States District Court at Los Angeles, and upon his appeal to the Ninth Circuit at the direction of the referee [No. 7, Appendix] and after the trustee had suffered judgment against him on all causes charged, including fraud, to vacate and set aside the original judgment.

The leading case of *U. S. v. Throckmorton*, 98 U. S. 61, 66, 25 L. Ed. 93, which refers to *Pico v. Cohn*, 91 Cal. 129, 133, 25 Pac. 970, the ruling case in California, the Court comments on the distinguishing features of these two types of fraud, concluding that equitable aid will be granted where it appears that "by some fraud practiced by the party securing relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

In the case of *Brady et al. v. Beams, et al., supra*, wherein the Tenth Circuit Court held that a United States Court sitting in equity may vacate and set aside a judgment for fraud which was extrinsic or collateral to the matter tried but not for fraud which was in issue in former suit,—a line of distinction between extrinsic

and intrinsic fraud is clearly stated by the same Honorable Justice Bratton in his opinion therein, at page 987:

> "Broadly stated, fraud practiced by a successful litigant which prevents his unsuccessful adversary from fully exhibiting his case, such as wrongfully preventing him or his material witnesses from attending the trial, inducing his attorney to professional delinquency or infidelity in connection with the case, or some other similar act, unmixed with fault or negligence on the part of the losing party, constitutes extrinsic or collateral fraud; and the introduction of perjured testimony or forged documents, or other cognate matter, which is actually considered in the judgment constitutes intrinsic fraud." (Citing *United States v. Throckmorton, supra; Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929.)

Freeman on Judgments, Volume III, page 2567, 5th Ed. 25, places the accent on what is perhaps the main distinction between intrinsic and extrinsic fraud:

> "It must be borne in mind that it is not fraud in the cause of action but fraud in the management which entitles the party to relief."

In permitting the referee to now relitigate the charge "that the material allegations in the complaint were knowingly false" would be to reopen an issue which was decided: (1st) by the original judgment, and after a hearing as to the truth or falsity of the material allegations in the complaint; (2nd) by the proceedings of Leonard J. Woodruff in the U. S. District Court at Los Angeles before the bankruptcy proceedings; (3rd) by the proceedings of the trustee in bankruptcy in his independent action before the United States District Court

at Los Angeles pursuant to order of the referee upon application of the same creditors now seeking to relitigate these issues before the referee; and (4th) by the judgment of the United States Circuit Court of Appeals for the Ninth Circuit,—all of which denied relief on this issue. The unanimous opinion of said Ninth Circuit Court against the trustee in bankruptcy and the bankrupt, in the case of *Jackson v. Heisey*, 111 F. (2d) 310, stated, "that the charge of fraud in obtaining the judgment was denied, not proved, and apparently abandoned."

In view of the fact that the "nature" of the fraud alleged does not appear in the decision of the said Ninth Circuit Court, we submit that the charge of fraud referred to, standing alone, is broad enough to embrace every conceivable issue of fraud, not alone extrinsic but also intrinsic. Accordingly, all fraud was thus determined by the final judgments on this charge and we submit cannot again be litigated another time before the referee to enable him to disregard, reverse, and invalidate all the previous proceedings by the trustee in his independent action in the U. S. District Court of California, his appeal therefrom and the final judgments there on the same issues. We respectfully urge that to hold otherwise would be contrary to the law of the United States Court and of the State Courts of California and of Oklahoma. [See Transcript of Record, Vol. II, p. 1253.]

The fraud charged now before the court is intrinsic fraud and had been theretofore litigated by the bankrupt and creditors through their trustee in bankruptcy in the California courts. We submit the final judgments theretofore rendered against the trustee are *res judicata*, and it is contrary to all the applicable principles of law that the

issue of such intrinsic fraud can now be relitigated by the creditor before the referee, in the presence of a well grounded plea of *res judicata* and a different judgment rendered by the referee, the effect of which is to reverse the United States District Court at Los Angeles and the United States Circuit Court of Appeals for the Ninth Circuit, which have already found against the trustee in bankruptcy on the same issues by their final judgments.

The rule set out in *Root v. Woolworth*, 150 U. S. 401, 37 L. Ed. 1123, 14 S. Ct. 136, is stated in 31 Am. Jur. paragraph 654, at page 230, as follows:

> "The acts for which a court of equity will, on account of fraud, command relief from a judgment have relation to extrinsic or collateral fraud, intrinsic fraud is not sufficient for equitable relief—Fraud has been regarded as intrinsic within the meaning of this rule where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been, litigated therein."

And in 31 Am. Jur. at paragraph 635, page 232, the following reasons are given for the distinction:

> "Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment; and that otherwise litigation would be interminable."

We submit that this equity rule applies to the equity powers of the bankruptcy court as to a retrial of the issues tendered by the trustee before the Los Angeles court, and that the general rule is that a final judgment resulting

from litigation at the direction or with the consent of the bankruptcy court is liquidated by such a final judgment, which rule has been disregarded and reversed by the majority opinion in the case at bar.

In the case of *Brady, et al. v. Beams, et al.* (132 F. (2d) 985), Circuit Court of Appeals, Tenth Circuit, on December 30, 1942, the Honorable Justice Bratton, the learned Circuit Judge who wrote the majority opinion in the case at bar which we seek by this proceeding to reverse, wrote a unanimous opinion affirming the same trial judge, the Honorable Eugene Rice, whose judgment he now has reversed and on this subject matter, to wit: intrinsic and extrinsic Fraud. We submit the opinion in *Brady, et al. v. Beams, et al., supra*, is elemental law and is and has been the uniform case law throughout the state courts and United States courts. It is reversed in its entirety by the opinion in the case at bar. For example, in *Brady v. Beams, supra*, the opinion holds to the well settled principles: (a) "A Federal Court sitting in equity may vacate a judgment for extrinsic or collateral fraud but not for fraud which was in issue in former suits;" (b) "In action to set aside former judgment for extrinsic or collateral fraud, it is essential that discovery of alleged fraud be made after entry of judgment complained of;" (c) "Where facts allegedly constituting fraud were squarely before trial court in former action and before Circuit Court of Appeals and Supreme Court on appeal from such judgment and on Petition for Certiorari, failure of plaintiff to rely on such facts in former action to challenge in advance entry of judgment on ground of invalidity for extrinsic or collateral fraud precluded subsequent action to set aside judgment;" (d) "Where no useful purpose can be served in remanding cause to trial

court for some technical error in procedure when such error could be corrected with same result, judgment was affirmed."

All of the foregoing recitals might well have been written into the opinion in the case at bar but instead this profound reasoning is completely reversed by the same Tenth Circuit in an opinion written by the same judge. Now, if permitted to stand as law, a trustee in bankruptcy, on application of creditors and himself, can obtain an order of the referee in bankruptcy in Oklahoma that the California U. S. District Court which rendered a judgment against the bankrupt prior to bankruptcy, which judgment had become final, was the proper forum wherein to test the validity of such judgment; that the trustee employ counsel and proceed to do everything necessary or proper to vacate such judgment [Appendix No. 7, p. 37; R. Vol. I, p. 28], and after proceedings are had in such court by such trustee, joined in by the bankrupt, in the form of an independent equity action to vacate the judgment and to retry the case on its merits and after all issues tendered by the trustee and bankrupt are determined adversely to them, including the charge that the judgment was obtained by fraud (which charge was denied and not proved) and after the referee has on further application of the trustee and creditors ordered the trustee to appeal to the Ninth Circuit Court, and after the trustee (joined by the bankrupt) has done so and again suffered adverse decision affirming the U. S. District Court—and such determination has become final,—the same creditors can then file objections before the referee and, under the guise of testing the "underlying claim," the referee sitting as a court of equity may disregard the action of the trustee in California in the U. S. District Court and the

Ninth Circuit Court, and the final judgments therein, and may in the presence of a well grounded plea of *res judicata* setting up such final judgments against the trustee, retry the original case on its merits by the same general charge in the objections.

D. Full Faith and Credit.

We submit that the referee in bankruptcy was legally bound to give full faith and credit to the judgment of the United States District Court for the Southern District of California against the trustee in bankruptcy, and to the judgment of the United States Circuit Court of Appeals for the Ninth Circuit against the trustee in bankruptcy.

In the case of *Titus v. Wallick*, 306 U. S. 282, and in the case of *Coppedge v. Clinton, et al.*, 72 F. (2d) 531 (a decision of the Tenth Circuit Court), the "full faith and credit" clause has been judicially defined. In these cases the defeated party claimed that he could collaterally attack a judgment for fraud. The opinion of the Supreme Court, in the former case, by the Honorable Justice Hughes held that the lower court, in permitting such an attack, had done so in full violation of "the full faith and credit" clause of the United States Constitution.

In the case of *Milliken v. Meyer, supra*, the Honorable Justice Douglas stated:

> "The full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or the consistency of the decision, or the validity of the legal principles upon which the judgmnt is based."

The referee in bankruptcy cannot relitigate the issue of intrinsic fraud as to the charge of falsity of the allegations of the complaint or perjured testimony in obtaining the original judgment of March 20, 1939; the referee must respect the judgment of the United States District Court for the Southern District of California and the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, against the trustee in bankruptcy on his collateral attack wherein he charged both intrinsic and extrinsic fraud in obtaining the original judgment.

E. The Attack By the Creditors, Through the Trustee in Bankruptcy, Upon the Final Judgment of Heiser Against Woodruff, the Bankrupt, Was a Collateral Attack.

The opinion of Chief Justice Hughes in *Chicot Co. v. Baxter State Bank*, 308 U. S. 371, 378, holds that a judgment is *res judicata* not only as to those matters which were decided but also as to all matters which could have been presented for decision.

The opinion of Chief Justice Hughes in that case, wherein he quotes *Grubb v. Public Utilities Comm.*, 261 U. S. 470, and *Cromwell v. Sac. Co.*, 94 U. S. 351, might well be said as regards the view of the majority opinion of the United States Circuit Court of Appeals for the Tenth Circuit in the case at bar:

> "Such a view is contrary to the well settled principle that *res judicata* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end."

And in regard to collateral attack his opinion stated:

> "And determination of such question, while open to direct review may not be assailed collaterally."

The opinion of the Tenth Circuit Court in the case at bar now would permit another collateral attack to test the validity of this original judgment under a theory of testing the underlying claim. The grounds, however, are the charges that the material allegations of the original complaint were knowingly false and that the judgment was secured through the use of perjured testimony allegedly given by Heiser. That would be a collateral attack on the ground of intrinsic fraud. This, we submit, he cannot do after judgment was rendered against the trustee in bankruptcy by the United States District Court for the Southern District of California, and affirmed by the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, after an appeal by the trustee. Those judgments were rendered against the trustee in bankruptcy as the result of the trustee's independent action, instigated in the federal court in California, wherein he included fraud as a ground of his attack but which was not proved, all as set out in the opinion of the Ninth Circuit. [Appendix No. 2, p. 11; R. Vol. I, p. 291.]

F. The Trustee Represents All Creditors and They Are Bound by His Action and by the Judgment Against Him.

In the case at bar, the objecting creditors of the bankrupt, Woodruff, all sought and obtained orders requiring the trustee in bankruptcy, P. M. Jackson, to litigate and test the validity of the Heiser judgment in the federal courts in California. [Appendix No. 7, p. 37; R. Vol. I, p. 28.]

In the case of *Fischer v. Pauline Oil Co.*, 60 Superior Court, p. 535, this Honorable Court held:

> "Where a trustee attacks a judgment in the court that rendered it and is unsuccessful he is estopped from setting up the same defense in the bankruptcy court."

It has been uniformly held, as set forth in the case of *In re Lewensohn*, 2 Civ., 121 Fed. 538, and the cases therein cited, that the trustee represents all the creditors and may therefore be relied upon to present all proper objections to the claims of those whose standing is questionable; and that a creditor, so far as he relies upon bankruptcy trustee to protect the estate against improper claims, is bound by what the trustee does or fails to do. (*Weil v. Neary*, 278 U. S. 160, 49 S. Ct. 144, 73 L. Ed. 243.)

In *Northwestern Pac. Railroad v. Slaught*, 205 U. S. 122, 27 S. Ct. 442, 51 L. Ed. 738, the court found that there was no substantial difference between the allegations previously made and those then before it, but if there be a difference the claim is one that respondents were required to bring forward in the prior suit.

We submit that it was never the intention of Congress to clothe a bankruptcy court with jurisdiction to reopen judgments and try cases summarily before a referee for intrinsic fraud, where a U. S. District court had already rendered a final judgment against the trustee and such court had jurisdiction of the subject matter and the parties. Of course, where the judgment was obtained by fraud or collusion the bankruptcy court would have jurisdiction; but even then it could not reopen the final judgment after the trustee in bankruptcy had once proceeded

in the court where the judgment was rendered, to have the judgment vacated and set aside in an independent proceeding and was unsuccessful; and the creditors cannot again set up the same matter before the bankruptcy court in face of a well grounded plea of *res judicata*. (*Fischer v. Pauline Oil Co., supra*, reversing 185 Okla. 108, 90 P. (2d) 411.).

G. A Final Judgment Cannot Be Attacked for Alleged Perjury in its Procurement, or That the Allegations of the Complaint Were Knowingly False.

We submit that the creditors of the bankrupt, Woodruff, cannot, under the guise of examining the underlying claim, again lawfully go before the referee in bankruptcy with objections to the claim based upon the original final judgment on the charge "that the material allegations in the complaint (original complaint) were knowingly false, that the judgment was secured through the use of perjured testimony given by the plaintiff and that a fraud was thus committed on the court and the parties." We submit that these creditors are forever precluded from again raising these same issues after the trustee in bankruptcy, representing these same creditors, has in an independent action collaterally attacked and tested the validity of a judgment on which the claim is based (all upon order of the referee [R. Vol. I, p. 28], based upon an application of creditors [R. Vol. I, p. 20] and the trustee [R. Vol. I, p. 21] and the bankrupt [R. Vol. I, p. 23] therefore, and after the trustee in bankruptcy has suffered a final judgment against him, both in the United States District Court, where the original judgment was rendered, and in the United States Circuit Court of Appeals (in all of which proceedings the bankrupt joined with the trustee), and wherein fraud was "charged, de-

nied and not proved." The Tenth Circuit opinion in the case at bar holds otherwise—even though the foregoing charges had reference to the complaint in the original action on which the original judgment resulted, and to testimony given in that action, all prior to the bankruptcy proceedings and prior to the commencement of the independent action by the trustee in both the District Court and the Ninth Circuit Court.

We respectfully direct this Honorable Court's particular attention to the "Bankrupt's statement with reference to the claim of M. E. Heiser" which appears in the Record, Vol. I, page 23. This was filed concurrently by the bankrupt with the application of the creditors [R. Vol. I, p. 20] and the application of the trustee in bankruptcy [R. Vol. I, p. 21] and before the referee made his order upon such pleadings authorizing and directing the trustee to institute legal action to vacate and set aside the judgment of M. E. Heiser against the bankrupt [R. Vol. I, p. 28], which order directed the trustee to employ counsel and proceed to test the validity of this judgment in California. The allegations of this Statement of the Bankrupt [R. Vol. I, p. 23] so filed with the referee prior to such order sets out under paragraph one "the material allegations of the complaint filed in said cause are untrue." [R. Vol. I, p. 23] This is the very same charge contained in the objection of the creditor which the Tenth Circuit majority opinion now permits the referee to relitigate nothwithstanding the well grounded plea of *res judicata* based upon the final judgments of the U. S. District Court at Los Angeles and of the U. S. Circuit Court of Appeals affirming it upon the proceedings instituted by the trustee in California pursuant to said order of the referee authorizing and directing the trustee so to do.

which order was in turn based upon the application of said objecting creditors and the trustee and the bankrupt. [R. Vol. I, pp. 20, 21 and 23.]

Commencing with the case of *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, and through a long line of Federal cases and California and Oklahoma cases, it has been uniformly held that "a showing of fraud practiced at such hearing of the original action will not suffice."

In the leading opinion of *U. S. v. Throckmorton*, 98 U. S. 61, 66, 25 L. Ed. 93, it is said that equitable aid will be granted where it appears that "by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of its case to the court"; and the opinion states "an examination of the authorities as to what fraud will warrant the aid of equity discloses that only upon proof of extrinsic and collateral fraud can a plaintiff secure equitable relief from a judgment; a showing of fraud practiced at the hearing of the original action will not suffice. This is characterized as intrinsic fraud and since there must be an end to litigation and such fraud was part of the case presented in the former suit, equity will not reopen the matter."

Certainly false or perjured testimony or falsity in the allegations of the complaint are intrinsic fraud, against which a defense may be made at the trial; and these issues were tendered by the charge of fraud in the proceedings had by the trustee in California in both the United States District Court and the United States Circuit Court of Appeals for the Ninth Circuit, wherein he suffered final judgments against him, and which we submit is binding upon these creditors.

None of the issues in the contest before the referee, approved by the majority opinion (of the case at bar), *viz.*, "that the material allegations in the complaint were knowingly false" and that the judgment (March 20, 1939) was secured through the use of perjured testimony given by Heiser, included any charge of extrinsic fraud or any suggestion thereof, whether measured by the cases cited or otherwise. If such fraud had reference to the "underlying claim" in the circumstances of the case at bar, then the judgment of the District Court at Los Angeles and of the Ninth Circuit Court being final against the trustee and the bankrupt, all subsequent to the date of adjudication, we have a clean case where the bankrupt himself and the present objecting creditors, through the trustee in bankruptcy pursuant to the order of the referee, have instituted the attack in the U. S. District Court of California and suffered final judgments against them on these very issues. They have not been prevented from full participation therein and they are precluded from trying these intrinsic fraud issues again at this time before the referee.

Those questions that the trustee in bankruptcy, P. M. Jackson, raised in his proceedings in the United States Courts in California on the order of the referee, or those which he could have raised but failed to present and thereby waived, cannot be subsequently urged before the referee by the same creditors, upon whose application the refree made his said order to the trustee to take such proceedings. Neither the trustee nor the creditors may pre-

sent their attack by piecemeal. (*Jackson v. Irving Trust Co.*, 310 U. S. 261, 85 L. Ed. 10; *Titus v. Wallick*, 306 U. S. 282; *Chilot Co. Dist. v. Baxter State Bank*, 308 U. S. 371, 378; *Grub v. Public Utility Com.*, 281 U. S. 470, 478, 479; *Moffett v. Robbins*, 81 F. (2d) 431; *In re Cherokee Public Service Co.*, 94 F. (2d) 536; *Beneficial Loan v. Noble*, 129 F. (2d) 425.)

Conclusion.

The majority opinion of the United States Circuit Court of Appeals for the Tenth Circuit [Appendix No. 3, p. 16] in the case at bar is in direct conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit [Appendix No. 2, p. 11] on the same matter in the case of *Jackson, etc. v. Heiser*, 111 F. (2d) 310. This constitutes a conflict of decisions on most important questions of bankruptcy law and equity which should be settled by this Honorable Court.

The opinion of the United States Court of Appeals for the Tenth Circuit in ruling that the referee in bankruptcy can now, in face of the record in the case at bar and in the presence of a well grounded plea of *res judicata*, hear and determine for a fifth time, the charge (a) that the material allegations of the complaint upon which the original judgment was obtained against Woodruff (March 20, 1939), were knowingly false, (b) that the said judgment was secured through the use of perjured testimony given by Heiser, and (c) that a fraud was thus committed upon the court which rendered the original judgment because such issues were never expressly adjudicated in

favor of Heiser,—is contrary to the foregoing ruling cases and the accepted law in all of the Circuits and to the decisions of this Honorable Court.

We submit that this majority opinion on the Tenth Circuit Court has so far departed from the accepted and usual course of jurisdictional proceedings in courts of bankruptcy before the referee, and of equity proceedings, and so far sanctions such departure by the lower courts, as to call for an exercise of this Honorable Court's power of supervision. We submit, further, that a final determination of this question by the Supreme Court of the United States is essential to the orderly and uniform administration of bankruptcy and equity cases.

The decision of the United States District Court of Oklahoma by the Honorable Eugene Rice, District Judge [Appendix No. 1, p. 2; R. Vol. I, p. 155], we submit should have been affirmed by the United States Circuit Court of Appeals for the Tenth Circuit in the case at bar based upon the sound principles of law set out in the opinion of Judge Rice [Appendix No. 1, p. 2] and approved in the dissenting opinion of the Honorable Justice Huxman [Appendix No. 4, p. 21; R. Vol. II; p. 1243]. The decision of the United States District Court by Judge Rice decides as a matter of law that the final judgments against the trustee in bankruptcy in the California courts instituted by the Trustee pursuant to the order of the referee on the application of the creditors, the trustee and the bankrupt, prevent the referee from sitting as a court in equity retrying upon its merits the two charges of

intrinsic fraud, namely, that the allegations of the complaint in the original action upon which the original judgment was rendered prior to the bankruptcy proceedings were knowingly false and that perjury was committed in obtaining such original judgment.

It follows that if the referee in bankruptcy cannot reverse the final judgment of the U. S. District Court of California (affirmed by final judgment of the U. S. Circuit Court of Appeals for the Ninth Circuit) against the trustee on proceedings had pursuant to order of the referee (upon application of the creditors, trustee and bankrupt therefor) to set aside and vacate and test the validity of a final judgment rendered by that Court against the bankrupt prior to the bankruptcy proceedings, he cannot thereafter, in the presence of a well grounded plea of *res judicata*, under the guise of "testing the underlying claim," which claim is based upon such final judgments, retry on the merits the same charges of the creditors: (a) Alleged perjury in the procurement of the original judgment, final before the bankruptcy proceedings; (b) the allegations of the complaint in such original action were knowingly false; both of which charges were in issue in and determined adversely to the trustee in such proceedings had by the trustee in such California courts. Remanding the case to the U. S. District Court of Oklahoma for findings on such merits is a useless and futile ruling in conflict with law and justice, and would result in endless, complicated, extended proceedings in bankruptcy never contemplated or heretofore permitted.

We respectfully submit that no useful purpose can be served by remanding these two issues to the United States District Court for a further finding upon the merits as directed in the majority opinion of the United States Circuit of Appeals for the Tenth Circuit, herein sought to be reversed.

Wherefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Tenth Circuit in the case at bar should be reversed and the judgment of the Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, should be affirmed.

Dated this 9th day of February 1946.

LEONARD J. MEYBERG,
208 West Eight Street, Los Angeles 14,
Counsel for Petitioner,

RUPERT B. TURNBULL,
Of Counsel.

APPENDIX.

1. Opinion and Order of Judge Rice, United States District Court, Oklahoma, in Case No. 7623. (R. Vol. I, p. 155.).

2. Opinion of Ninth Circuit in Case No. 9350. (R. Vol. I, p. 291.)

3. Opinion of Tenth Circuit (majority), in Case No. 3052. (R. Vol. II, p. 1239.)

4. Opinion of Tenth Circuit (dissenting), in Case No. 3052. (R. Vol. II, p. 1243.)

5. Order and Stipulation in United States District Court (California) in Case No. 7256C. (R. Vol. I, p. 70.)

6. Referee's Certificate on Review including Findings in Case No. 7623 (Oklahoma). (R. Vol. I, p. 148.)

7. Order of Referee authorizing and directing trustee Jackson to institute legal action to vacate and set aside Judgment of M. E. Keiser against Bankrupt. (R. Vol. I, p. 28.)

Opinion of Judge Rice, United States District Court (in Case No. 7623).

In the District Court of the United States, for the Eastern District of Oklahoma.

In the Matter of the Bankruptcy of Leonard J. Woodruff, Debtor. No. 7623 in Bankruptcy.

[Filed June 23, 1944.]

MEMORANDUM.

On July 5, 1939, Leonard J. Woodruff (hereinafter referred to as the bankrupt), was adjudged to be a bankrupt by this court upon his voluntary petition filed herein. This was but a few days after the United States District Court for the Southern District of California, Central Division, had refused after a hearing to modify a judgment which had been entered against the bankrupt on March 20, 1939. Prior thereto, the United States District Court for California had refused to set aside an entry of default judgment against the bankrupt. It is my conclusion that the action of the California Court in refusing to set aside the default judgment and to modify the judgment after a hearing precipitated the filing of the bankruptcy in this court. The chief controversy in this proceeding has centered upon the contest between Heiser and the bankrupt and has had to do with the judgment mentioned above.

In the bankruptcy proceeding three groups of claims have been filed: (1) Claim of Heiser, based upon his judgment, (2) Claim of Willie May Woodruff, wife of the bankrupt, and (3) The claims of Howard L. Woodruff, Margueritte B. Woodruff and Leonard Woodruff, Jr., children of the bankrupt. The claim of Heiser was

denied by the referee. The claim of Willie May Woodruff, the wife, was allowed by the referee in the total amount of $812,176.15, being $477,750.68 principal and $334,425.47 interest to the date of the order. The claim of Howard L. Woodruff was allowed for the total sum of $75,177.12. The claim of Margueritte B. Woodruff was allowed in the total sum of $83,097.33. The claim of Leonard Woodruff, Jr., was allowed in the total sum of $53,097.33. The action of the referee in disallowing Heiser's claim and in allowing the claim of the wife and the claims of the children are now here on bill of review brought by Heiser.

The bankrupt, his wife and three children, objected to Heiser's claim. Heiser objected to the claim of the wife and the claim of each of the children except that Heiser admitted the claim of the wife should be allowed to the extent of $18,000.00, and that the claim of Howard L. Woodruff should be allowed in the sum of $2,048.75.

The three groups of claims will be discussed separately.

Claim of Heiser.

P. M. Jackson, an attorney of Ardmore, Oklahoma, was appointed and qualified as trustee in bankruptcy of the bankrupt's estate. Early in these proceedings the trustee joined by the bankrupt and the other two groups of creditors applied to this court for authority to begin proceedings in the United States District Court for the Southern District of California to vacate and set aside the judgment rendered therein. The trustee was authorized by this court to employ competent counsel in California to represent him, to take all necessary and proper steps to vacate the Heiser judgment. This the trustee did. The bankrupt joined in the action begun by the trustee. The

result of their efforts is disclosed in the decision of the Circuit Court of Appeals of the Ninth Circuit, Jackson v. Heiser, 111 Fed. (2d) 310. The history of this judgment is well disclosed in the opinion of the Circuit Court, *supra*. It is not necessary herein to recount the facts set forth therein.

The referee in his certificate of review states that two questions are presented: (1) Does the judgment prevent the bankruptcy court from considering the underlying claim of Heiser and allowing or disallowing it in whole or in part? (2) Is the evidence of objectors sufficient to defeat the claim? The referee answered the first question in the negative, the second in the affirmative, and disallowed the claim. In my opinion the referee erred in answering the first question as he did, and it was not necessary to consider the second.

The Heiser judgment was and is a final judgment entered by a United States District Court, a member of the same judicial body of which this court is a member. Before reaching this court for decision in bankruptcy, it had been attacked by both the bankrupt and the trustee in bankruptcy who was acting for the benefit of the other creditors. The judgment had the approval not only of the trial court but of the Circuit Court. It is *res judicata* as to all matters actually litigated or which might have been litigated therein. Moffett v. Robbins, 81 Fed. (2d) 431; *In re* Cherokee Public Service Co., 94 Fed. (2d) 536.

Section 63 a (1) of the Bankruptcy Act (11 U. S. C. A. Sec. 103 (a) (1), is applicable and provides debts of a bankrupt are provable and allowable which are founded upon

"* * * a fixed liability as evidenced by a judgment * * * absolutely owing at the time of the filing of the

petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date * * *."

For a discussion on the conclusiveness of judgments in a bankrupty, see Gilbert's Collier on Bankruptcy, Fourth Edition, Sec. 1247, page 968; also, Collier on Bankruptcy, 14th Edition, Vol. 3, page 1817; Murphy v. McLaughlin, 247 Fed. 385; Beneficial Loan Co. v. Noble, 129 Fed. (2d) 425.

In Pepper v. Litton, 308 U. S. 295, the Supreme Court held that the attack of a trustee in the state court upon the judgment involved therein was not *res judicata*. In the opinion the court said:

"And the bankruptcy trustee may collaterally attack a judgment offered as a claim against the estate for the purpose of showing that it was obtained by collusion of the parties or is founded upon no real debt."

and in a foot-note the court said with respect to the above statement:

"This is, of course, in absence of a plea of *res judicata*."

In his application to this court by the trustee (in which application the objectors joined) to attack the Heiser judgment, it was stated that the judgment was based upon an erroneous, unjust and void judgment and was without merit. The order of this court to the trustee was full and complete authorizing him to do any and all things necessary and proper to avoid the judgment and thus defeat any claim based thereon. The purpose in authorizing the trustee to begin such proceedings was to defeat the judgment and thus avoid a claim based thereon in the bankruptcy proceedings. Had the trustee succeeded in his action, Heiser's claim, based upon the judgment, would have been defeated; and had Heiser's judgment been de-

feated, that would have been an adjudication against him as to all his rights against the bankrupt. I think it follows that an adverse decision on the action begun by the trustee and the bankrupt is *res judicata* in favor of Heiser. See Beneficial Loan Co. v. Noble, 129 Fed. (2d) 425. For the effect to be given by this court to the judgment of another United States District Court, see Caterpillar Tractor Co. v. International Harvester Co., 120 Fed. (2d) 82; Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522.

The action of the referee in disallowing Heiser's claim is error. The petition for review is allowed, and the referee's decision is reversed.

THE WIFE'S CLAIM.

Willie Mae Woodruff, the wife, bases her claim upon a trust created in her behalf whereby the bankrupt in the capacity of trustee handled her money and made investments for her. Admittedly, the bankrupt under an oral agreement with his wife at a time when both were prospering, invested his wife's money in securities, buying and selling them very much as he pleased. It was the wife's contention that the bankrupt was not to speculate with her funds. The evidence, however, discloses that the wife was at all times informed generally as to the transactions being had by the bankrupt. The investments by the bankrupt were in various securities, and when the crash came most of the bankrupt's cash and that of the wife were lost. The bankrupt had been purchasing stocks on a marginal basis on the New York Stock Exchange. In 1931 the bankrupt had difficulties with the United States government in connection with his income taxes. All his cash and securities, and all of his wife's cash and securities with the exception of $18,000.00, was required

to relieve the bankrupt of the difficulties in which he found himself. The record discloses that the wife knew in general how the bankrupt was handling his money and that she acquiesced therein.

My conclusion is that the wife authorized the bankrupt to invest her money in any way in which the bankrupt in good faith believed would be to the best interest of his wife. The wife does not question the good faith of the bankrupt. On the contrary, she admits it. The wife knew in 1931 that her securities were being sold to pay income taxes and that she had lost her investments, yet she made no objection until the institution of this bankruptcy proceeding. Under this state of the record, the claim of the wife should not have been allowed in excess of $18,000.00. The referee's decision allowing the claim in full is reversed, and said claim is allowed for $18,000.00 and no more.

THE CHILDREN'S CLAIMS.

The claims of the children are based upon alleged trusts created approximately twenty years before bankruptcy. The claimants present their claim upon the theory of a trust. The objector, Heiser, discusses their claims upon the theory of gifts *inter vivos*. The referee, after a hearing, determined that under the facts there was created a trust by the bankrupt in favor of each of the children in which trust the bankrupt was the trustee. These separate trusts were created by the purchase of certain stocks for one or the other of the children. The evidence discloses the stocks that were purchased and the amount thereof, and conclusively shows that these stocks were converted by the bankrupt many years ago.

The decision of the referee finding that there was a trust is sustained. However, the amount of the claim as

to each of the children should be reduced in the amount of $9,925.83 plus $11,132.50, or a total of $21,058.33. The reason for this reduction is as follows: The evidence in support of the creation of a trust was the evidence of the bankrupt himself, sustained by certain corroborating facts. The evidence of the bankrupt shows that the $9,925.83 item, plus the $11,132.50 mentioned above, was an investment in Imperial Irrigation bonds; that a short time after purchasing the Imperial Irrigation bonds he concluded that they were not a good investment and traded them for the Salt River Valley Water Users Association bonds; that the latter bonds proved to be more valuable; that the bankrupt subsequently converted and appropriated the Salt River Valley Waters Users Association bonds. The amount of the claim as approved by the referee includes the value of both bonds plus the interest upon the value of the bonds. The bankrupt did not make two investments for his children. He merely changed the form of an investment. There were not two additions to the corpus of the trust estate—there was only one; and the bankrupt's estate is chargeable only with the value of the Salt River Valley Water Users Association bonds. Included in the claim of each child, and allowed by the referee, is the item of $9,925.83, the value of the Imperial Irrigation bonds, plus $11,132.50 accumulated interest. This amount should be deducted from the claim of each child; and as so modified the decision of the referee as to the claim of each of the children is approved.

An order conforming to the views herein is this day entered.

This the 23rd day of June, 1944.

EUGENE RICE,
United States District Judge.

In the District Court of the United States, for the Eastern District of Oklahoma.

In the Matter of the Bankruptcy of Leonard J. Woodruff, Debtor. No. 7623 in Bankruptcy.

[Filed June 24, 1944.]

ORDER.

Now on this 24th day of June, 1944, this case comes before this court for consideration on three separate certificates on review filed by the referee in bankruptcy, and based on petitions for review filed by M. E. Heiser, seeking review of an order of the referee disallowing the claim of Heiser in the amount of $278,631.71, an order allowing the claim of Howard L. Woodruff in the amount of $75,177.12, the claim of Margueritte B. Woodruff in the amount of $83,097.33, and the claim of Leonard Woodruff, Jr., in the amount of $83,097.33, and an order allowing the claim of Willie May Woodruff in the sum of $812,176.15.

On consideration of the briefs and oral arguments of the parties, the court being fully advised in the premises, is of the opinion and finds that the referee erred in denying the claim of M. E. Heiser, and that such claim should be allowed; that the referee erred in allowing in full claims of Howard L. Woodruff, Margueritte B. Woodruff and Leonard Woodruff, Jr., and that each of such claims should be reduced in the amount of $21,058.33, and allowed as so reduced; and that the referee erred in allowing in full the claim of Willie May Woodruff, and that such claim should be denied except as to the sum of $18,000.00, in which amount she admittedly has a valid claim, and that such claim should be allowed in the amount of $18,000.00.

It is, therefore, Ordered, Considered, Adjudged and Decreed that the petition for review of the Heiser claim is sustained; that the referee's order disallowing the said claim is set aside; and that the claim of M. E. Heiser in the amount of $278,631.71 is allowed.

It is further Ordered and Decreed that the petition for review of the referee's order allowing the claims of Howard L. Woodruff, Margueritte B. Woodruff, and Leonard Woodruff, Jr., is sustained; that the referee's order allowing such claims is amended as to the amount of the claims; and that the claim of Howard L. Woodruff is allowed in the sum of $54,118.79, the claim of Margueritte B. Woodruff is allowed in the sum of $62,039.00, and the claim of Leonard Woodruff, Jr., is allowed in the sum of $32,039.00.

It is further Ordered and Decreed that the petition for review of the referee's order allowing in full the claim of Willie May Woodruff is sustained; that the referee's order is modified, and that the claim of Willie May Woodruff is allowed in the sum of $18,000.00, and is otherwise disallowed.

EUGENE RICE,
United States District Judge.

Opinion in Ninth Circuit (in Case No. 9356).

United States Circuit Court of Appeals for the Ninth Circuit.

P. M. Jackson, trustee in bankruptcy of the estate of Leonard Woodruff, a bankrupt, and Leonard Woodruff, Appellants, vs. M. E. Heiser, Appellee. No. 9356.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Before Denman, Mathews and Stephens, Circuit Judges.

Mathews, Circuit Judge:

This appeal is from (1) an order which, on June 29, 1939, refused to modify a default judgment in an action for damages for conversion of property and (2) an order which on September 26, 1939, denied a motion to vacate the judgment, set aside the entry of default and permit answers to be filed.

The action was brought by appellee, M. E. Heiser, against Leonard Woodruff and others in the District Court of the United States for the Southern District of California. Appellee is a British subject. Woodruff is a citizen of California and a resident of the Southern District thereof. One of Woodruff's co-defendants is a citizen of Nevada. The others are citizens of California. The amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000. The District Court has jurisdiction of the action.

The action was commenced on July 11, 1935. Summons was issued on that day, but, being unable to find the defendants, the marshal returned that summons unserved. Another summons was issued on April 21, 1937. On

January 25, 1939, E. M. Daniels was specially appointed by the court to serve the summons and complaint on Woodruff,[1] but Daniels never made such service. The marshal, on January 31, 1939, did make such service by leaving copies of the summons and complaint at Woodruff's dwelling house and usual place of abode with a person of suitable age and discretion then residing therein.[2]

On February 23, 1939, it appearing by affida it and otherwise that Woodruff had failed to plead or otherwise defend, the clerk entered his default.[3] Thereafter appellee applied to the court for judgment. The court, on March 20, 1939, concluded a hearing to determine the amount of damages and, at the conclusion thereof, entered judgment against Woodruff for $164,000, with interest and costs.[4] From that judgment no appeal was taken.

On March 29, 1939, Woodruff filed a motion to vacate the judgment, set aside the entry of default and permit him to answer. The motion was heard on April 10, 1939, and, by an order entered on June 8, 1939, was denied. From that order no appeal was taken.

On May 25, 1939, appellee and Woodruff stipulated in open court that the court might hear evidence as to the value of the converted property, and that, if the value thereof was found to be less than the amount ($164,000) awarded by the judgment, the judgment might be modified accordingly. On June 29, 1939, a hearing was had, pursuant to the stipulation. Both parties (appellee and Woodruff) appeared and participated in the hearing. The court

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[1]Federal Rules of Civil Procedure, Rule 4(c).

[2]*Id.*, Rule 4(c), (d) (1).

[3]*Id.*, Rule 55(a).

[4]*Id.*, Rule 55(b) (2).

found that the value of the property was the amount awarded by the judgment. Accordingly, by an order entered on June 29, 1939, the court refused to modify the judgment.

On July 5, 1939, Woodruff was adjudged a bankrupt. On July 20, 1939, P. M. Jackson was appointed and qualified as trustee in bankruptcy of Woodruff's estate. On September 26, 1939, pursuant to written notice theretofore served and filed Jackson and Woodruff (hereafter called appellants) moved the court to vacate the judgment in the law action, set aside the entry of default and permit the filing of answers by appellants. The motion was heard and, by an order entered on September 26, 1939, was denied. From that order and the order of June 29, 1939, this appeal was taken on September 29, 1939.

The order of June 29, 1939, was not a final decision within the meaning of Section 128 (a) of the Judicial Code, 28 U. S. C. A., Section 225 (a), and was not appealable.

Republic Supply Co. v. Richfield Oil Co., 9 Cir., 74 F. (2d) 909, 910; Benson v. United States, 9 Cir., 93 F. (2d) 749, 751.

A claimed ground of appellants' motion of September 26, 1939, was that the judgment was obtained without valid service of process. Another claimed ground of the motion was that the judgment was obtained by fraud. Thus, by their motion, appellants instituted what was, in effect, an independent action or proceedings. Hence, the order of September 26, 1939, was a final decision, within

the meaning of Section 128(a) of the Judicial Code, 28 U. S. C. A., Section 225(a), and was appealable. Stevirmac Oil Co. v. Dittman, 245 U. S. 210, 214, 216; Rust v. United Waterworks Co., 8 Cir., 70 F. 129, 132.

The District Court properly refused to vacate the judgment as having been obtained without valid service of process. For, as previously shown, service was made on January 31, 1939, in accordance with Rule 4 of the Federal Rules of Civil Procedure then in effect, and was, we think, valid service. Furthermore, even if not validly served with process Woodruff, by entering into the stipulation of May 25, 1939, and by participating in the hearing of June 29, 1939, waived such service and voluntarily submitted himself to the jurisdiction of the court.

The charge that the judgment was obtained by fraud was denied and not proved. That ground of appellants' motion appears to have been abandoned. Other claimed grounds of the motion were that the judgment was prematurely entered and was otherwise erroneous; that the complaint did not state a cause of action and was otherwise defective; and that the complaint showed on its face that the action was barred. These were matters which, if true, might have been urged as defenses or, if the judgment had been appealed from, as grounds for reversal. They were not grounds on which, without more, the court rendering the judgment could properly vacate it.

As further (and final) ground of their motion, appellants stated that they, Jackson and Woodruff, had a good defense to the action, but were prevented from present-

ing it by reason of fraud, accident, surprise and excusable neglect. The statement that Jackson had a defense to the action and was prevented from presenting it was obviously untrue, as he was not a party to the action. As to Woodruff, the court apparently disbelieved the statement and disbelieved the evidence, if any, tending to support it. In this, we cannot say that the court erred; much less that it abused its discretion.

The appeal, insofar as it is or purports to be an appeal from the order of June 29, 1939, is dismissed.

The order of September 26, 1939, is affirmed.

WILLIAM DENMAN,
United States Circuit Judge.

CLIFTON MATHEWS,
United States Circuit Judge.

ALBERT LEE STEPHENS,
United States Circuit Judge.

[Filed April 30, 1940.]

Opinion of Tenth Circuit (in Case No. 3052).

United States Circuit Court of Appeals, Tenth Circuit.

Willie Mae Woodruff; Howard L. Woodruff; Marguerite Woodruff; Leonard Woodruff, Jr.; Ida Belle Woodruff; and Leonard J. Woodruff, Appellants, vs. M. E. Heiser, Appellee. No. 3052—May Term, 1945.

[August 11, 1945.]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

Louis A. Fischl and Thos. W. Champion (H. A. Ledbetter was with them on the brief) for Appellants.

Leonard J. Meyberg and Rupert B. Turnbull (T. G. Gibson was with them on the brief) for Appellee.

Before Phillips, Bratton and Huxman, Circuit Judges.

Bratton, Circuit Judge:

This is an appeal from a judgment allowing a claim in bankruptcy. A brief statement of the background may be helpful in understanding the manner in which the questions for determination arise. In 1935, M. E. Heiser sued Leonard J. Woodruff and others in the United States Court for Southern California. It was alleged in the complaint that plaintiff had been and was engaged in the business of mining and marketing raw gems, particularly emeralds, sapphires, and zircons; that in 1928, he arrived in the United States from Australia on a business trip to find and establish a regular and ready market for raw gems, mined under his control and management in Australia; that he then owned and had in California certain sapphires, opals, zircons, and jade; that such gems were reasonably worth $164,000; and that the defendants cheated and defrauded him out of them. The defendant

Woodruff failed to answer or otherwise plead in the case; plaintiff submitted evidence; and on March 20, 1939, the court entered judgment against such defendant for $164,000, together with accrued interest, aggregating $277,036.71. The defendant filed a motion to set aside the judgment. The motion was denied. The parties stipulated that the court might hear evidence respecting the value of the property of plaintiff for which damages were awarded in the judgment; and that should the court find the value to be less than the amount of the judgment, the judgment should be modified and reduced to the amount which represented the value of the property. On June 29, 1939, after hearing evidence, the court found the value of the property to be the amount fixed in the judgment.

Woodruff filed in the United States Court for Eastern Oklahoma his voluntary petition in bankruptcy; and, on July 5, 1939, an order of adjudication was entered. Heiser filed in the proceeding an unsecured claim, based upon the judgment. The referee entered an order authorizing any creditor of the estate to contest any claim filed. Willie Mae Woodruff, wife of the bankrupt, and Ida Belle Woodruff, as creditors, filed objections to the claim of Heiser; and the bankrupt also filed objections. The referee authorized the trustee to employ an attorney in California and take such legal steps as seemed necessary and proper to vacate the judgment. The trustee and Woodruff filed in the cause in California a joint motion to vacate the judgment, vacate the default, vacate the orders entered after the rendition of the judgment, permit Woodruff to answer, and permit the trustee to intervene. The court denied the motion, Woodruff and the trustee appealed, and the order was affirmed. Jackson v. Heiser, 111 F. (2d) 310. The

referee later heard evidence and disallowed the claim in toto; on review, the district court entered judgment allowing it in full; and by order, the court authorized the objecting creditors to appeal from the judgment.

The action of the district court in allowing the claim was predicated upon the conclusion that the proceedings in California constituted res judicata of the matters set up in the objections. Section 2 of the Bankruptcy Act, as amended, 52 Stat. 840, 11 U. S. C. A. §11, provides among other things that the district courts sitting in bankruptcy shall be vested with such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in proceedings under the act; and that they may make such orders and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the act. A court of bankruptcy is essentially a court of equity, and its proceedings are inherently proceedings in equity. It exercises equitable powers of wide sweep in relation to problems arising out of the administration of bankrupt estates; and, with appropriate regard for rights acquired under the law of the state, its equitable powers may be exerted in full vigor with respect to the allowance of claims, the rejection of claims, or the subordination of claims to other claims. Pepper v. Litton, 308 U. S. 295; Prudence Realization Corp. v. Geist, 316 U. S. 89.

A bankruptcy court in which an estate is being administered has full power to inquire into the validity of an alleged debt of the bankrupt upon which a claim against the estate is based. And the merger of the original debt or obligation into judgment does not take away the power of the bankruptcy court to inquire into its provability. Notwithstanding the change in form of the liability from

a simple contract debt, or an unliquidated claim, into a judgment of a court of record, it remains the same debt and the bankruptcy court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance or rejection." Pepper v. Litton, *supra*. And in the absence of a well grounded plea of *res judicata*, the trustee in bankruptcy may collaterally attack a judgment which is presented as a claim against the estate on the ground that it was founded upon no real debt of the bankrupt. Pepper v. Litton, *supra*.

The claim of Heiser was contested on the grounds that no personal service of summons was had upon the defendant Woodruff in the action in California; that the complaint filed in the action failed to state a cause of action under the laws of California; that the complaint showed on its face that if plaintiff ever had any cause of action, it was barred by the statutes of limitation of California; and that the judgment was void for the reason that the complaint undertook to state three separate and distinct causes of action and the judgment failed to specify the cause upon which it was rendered. By the motion to vacate the judgment, set aside the default, vacate the orders entered after the rendition of the judgment, and permit the interposition of a defense to the action, the trustee and the defendant Woodruff expressly attacked the judgment on these grounds, and others. The trustee was acting for all of the creditors of the estate of the bankrupt, and the determination of such issues adverse to him constitutes *res judicata* here to that extent and protects the judgment against collateral attack on those grounds. Pepper v. Litton, *supra*.

But the grounds of contest did not end there. It was specifically charged in the objections that at the time of the filing of the suit in California and at the time of the

rendition of the judgment, Woodruff was not indebted to Heiser in any amount; that the material allegations contained in the complaint were untrue; that the judgment was obtained through the use of perjured testimony given by Heiser; and that he thus committed a fraud upon the court and the parties. The record fails to indicate that these matters were placed before the court in California, either in the motion of the defendant Woodruff to vacate the judgment, by the motion of the trustee and the defendant Woodruff to set aside the judgment, or otherwise. Therefore the judgment did not constitute *res judicata* in respect of these issues, and the claim was open to attack on these grounds. Pepper v. Litton, *supra*. In reaching this conclusion we are mindful of the statement in Jackson v. Heiser, *supra*, that the charge of fraud in obtaining the judgment was denied, not proved, and apparently abandoned. But the nature of the fraud referred to does not appear. And the record before us does not contain any showing that the contention that the material allegations in the complaint were knowingly false, that the judgment was secured through the use of perjured testimony given by Heiser, and that a fraud thus was committed on the court and the parties was ever submitted to the court in California by motion to vacate the judgment or otherwise, or that such issues were ever expressly adjudicated by that court in favor of Heiser.

The evidence concerning the claim was extensive and presented issues of fact. But the court did not make any formal findings of fact or conclusions of law. It was the duty of the court to make findings and conclusions, in accordance with Rule of Civil Procedure 52(a). And where the issues cannot be decided satisfactorily on appeal without findings of fact by the trial court, the judgment may

be vacated and the cause remanded in order that findings of fact may be made. Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310; Kelley v. Everglades Drainage District, 319 U. S. 415.

Where the trial court embodied in its written opinion specific findings on the material issues of fact and set out conclusions on the important questions of law involved, the cause should not be remanded for formal findings and conclusions. Carter Coal Co. v. Litz, 140 F. (2d) 934. The court rendered an opinion in writing, but it does not present the findings or conclusions of the court upon the issues open to inquiry concerning the debt or obligation underlying the judgment. And the issues can not be satisfactorily decided on appeal without findings of fact.

The provision in the judgment allowing the claim of Heiser is vacated, and the cause is remanded for appropriate action in conformity with this opinion.

Huxman, Circuit Judge, Dissenting:

I think the judgment of the lower court is right and should be affirmed on the ground that the issue presented is *res judicata*.

It is of course well settled that a bankruptcy court is not precluded from inquiring into the validity of a claim by the mere fact that it has been reduced to judgment, but when the validity of the judgment has been adjudicated since its entry, no good reason appears why a court of bankruptcy under its equitable powers should again relitigate the same issue.

The gist of the fraud with which Heiser was charged and which was made the basis of the attempt to defeat his claim in the bankruptcy court was that he panned off a bunch of worthless stones as jewels and by the use of

perjured and false testimony as to their value obtained a default judgment in the California court which now is the basis of his claim. This is the only fraud with which he has ever been charged. It is the basis of every effort of the Woodruffs or of the trustee to resist his claim.

In my view, this question of fraud in the procurement of the default judgment has been adjudicated twice since its entry. It was first adjudicated at the hearing on Woodruff's motion to set aside the default judgment, which was filed nine days after the entry thereof. While the record is not as clear on this point as might be desired, the charge must have been made at that time that the judgment was fraudulent because the gems had no value. This must have been so because while the court refused to set the default aside, it was stipulated in open court that the court should hold a hearing as to the value of the gems, and that the amount of the judgment should be modified if required in accordance with the evidence produced at such hearing. Pursuant to this stipulation a lengthy hearing was had in which both Woodruff and Heiser appeared and participated. At the end of that adversary hearing, the court found the value of the property to be the amount of the judgment, and accordingly refused to modify the judgment. So it appears that Woodruff got everything he would have gotten had his motion been sustained and had he been permitted to answer and defend.

Immediately after the court ruled against Woodruff, he went into bankruptcy, and this proceeding resulted. The order of the court refusing to modify the amount of the

judgment was entered June 29, 1939. On July 5, 1939, Woodruff was adjudged a bankrupt on his voluntary petition in the United States District Court for the Eastern District of Oklahoma. Jackson was appointed trustee on July 20, 1939. On September 11, 1939, pursuant to authority theretofore obtained, he filed a notice of motion to vacate the default judgment in the United States District Court of California where the default judgment had been obtained. He also filed an affidavit of merit in support of his motion. The notice set forth many grounds in support thereof. Among others, it stated that the motion "will be made upon the ground that a fraud was practiced upon the above entitled court with respect to the entry of said judgment." The affidavit of merit by the trustee in support of the motion to set the judgment aside, among others, recited upon information and belief that the "judgment . . . is based upon fictitious values and was obtained by methods which amounted to a constructive fraud . . . and in the event said judgment is set aside the alleged claim of said M. E. Heiser can be defeated in whole at a trial on the merits."

So here we have a direct attack upon the validity of the judgment on account of fraud in its procurement by the trustee himself. He failed in this attack in the California District Court. Why should he be permitted to raise the same question again a second time in the United States District Court of Oklahoma?

I cannot agree with the statement in the majority opinion that the issue of fraud in the procurement of the original

judgment by the use of false and fraudulent testimony as to the value of the gems was not placed before the California court by the trustee's motion and supporting affidavit. The notice of motion alleged fraud and the affidavit stated that the judgment was based upon fictitious values and was obtained by methods that amounted to a constructive fraud. This could mean only one thing, namely, that the testimony as to the value of the gems was fictitious, false and fraudulent. Heiser's affidavits denied that any fraud was practised upon the court. This presented a clear-cut issue of fraud in the procurement of the judgment. It was the duty of the trustee to substantiate the charge. This he failed to do.

Nor is it sufficient to say that the trustee was denied the opportunity to introduce oral testimony to support the charge. The record does not reveal that any oral testimony was offered or that the trustee was denied the right to introduce any testimony. But if he was denied this right, he should have raised the question when he appealed the case to the Circuit Court of Appeals.

Apparently the trustee abandoned the charge of fraud both in the California District Court and in the Circuit Court of Appeals. See Jackson v. Heiser, 111 F. (2d) 310. But this he will not be permitted to do. One of the issues presented by both Woodruff and the trustee in their motions to vacate the judgment was fraud in the use of false and fictitious testimony relating to the value of the stones. The issue as tendered was broad enough to prove every kind and nature of fraud. It is incumbent upon one

attacking the validity of a judgment to present every available ground of which he has knowledge. He may not present his claim by piece meal. Grubb v. Public Utility Com., 281 U. S. 470, 478, 479. It is not claimed that the trustee was without knowledge of the claimed facts which would have enabled him to present the issue. He had the active help and assistance of Woodruff throughout in his efforts to vacate the judgment. Woodruff filed a motion with him to vacate this judgment.

The Circuit Court of Appeals of the Ninth Circuit treated the motion of the trustee as an independent action or proceeding attacking the judgment. The trustee tendered the issue of fraud in this proceeding and was defeated. He appealed, and abandoned the charge of fraud. A judgment is *res judicata* not only as to those matters which were decided, but also as to all matters which could have been presented for decision. Chicot Co. Dist. v. Bank, 308 U. S. 371, 378. Two attacks have already been made upon this judgment since its entry on the ground there was no value to these stones and that the testimony establishing the value was fraudulent, fictitious and perjured. I do not think that either the Woodruffs or the trustee is entitled to try the issue a third time.

A true copy.

Attest: ROBERT B. CARTWRIGHT,
Clerk U. S. Circuit Court of Appeals, Tenth Circuit.

[SEAL.] By GEORGE A. PEASE,
Chief Deputy Clerk.

[Exhibit C-1. R. Vol. I. p. 70.]

Order.

In the District Court of the United States, Southern District of California, Central Division.

M. E. Heiser, Plaintiff vs. Leonard Woodruff *et al.*, Defendants. No. 7256-C.

Motion of defendant Leonard Woodruff for order of this court to vacate and set aside the default and the default judgment entered herein against the said defendant, and to permit the said defendant to file his answer herein; having come on regularly for hearing on the 10th day of April, 1939, at 10 o'clock A. M. of said day, the Honorable Judge Geo. Cosgrave presiding and Ames Peterson, Esq. appearing as counsel for the defendant Leonard Woodruff and Leonard J. Meyberg, Esq. appearing as counsel for the plaintiff herein, and the court being fully advised in the premises, and the said Ames Peterson, Esq., counsel for said defendant Leonard Woodruff, having applied to the court for permission to file additional points and authorities and the court having allowed the said defendant Leonard Woodruff time within which to file the same and having allowed time to the plaintiff within which to answer the same, and the said parties having filed their additional points and authorities and additional affidavits, the said parties having appeared before the court on the 25th day of May, 1939, at the hour of 2 o'clock P. M., the defendant Leonard Woodruff by his counsel Ames Peterson, Esq., and the plaintiff by his counsel Leonard J. Meyberg, Esq., and the said parties having, through their said respective counsels, stipulated that all affidavits filed be a part of the record, and the court being fully advised in the premises, and the matter having been submitted, and no adverse interest appearing.

It Is Hereby Ordered that the motion of defendant Leonard Woodruff for the order of this court to vacate and set aside the default and the default judgment heretofore entered herein against the said defendant Leonard Woodruff and for order of this Court permitting said defendant Leonard Woodruff to file his answer herein, be, and the same is, hereby denied.

The parties appearing before the court on May 25, 1939, through their said respective counsel, to-wit: Plaintiff Leonard J. Meyberg, Esq., and defendant Leonard Woodruff by Ames Peterson, Esq., having further stipulated that on Monday, June 12, 1939, at 2 o'clock P. M., or as soon thereafter as counsel may be heard, the said Judge of the Court herein may hear evidence on behalf of the plaintiff and evidence on behalf of said defendant Leonard Woodruff as to the value of the property of plaintiff herein, for which damages were allowed in the judgment herein against the said defendant, which said hearing shall be without a jury, a jury being expressly waived by the parties, and the issue at such hearing to be limited to ascertaining by the Judge of the said Court, from such evidence to be presented by the said parties under the rules of evidence of the said Court, the sum or amount of damage that may represent the value of the said property of plaintiff for which damages were allowed in the said judgment herein against the said defendant, as in said complaint alleged, and that should the said Judge of the said Court, after such hearing, find from such evidence that the value of the said property with interest thereon at 7% per annum from May 13, 1929, to date of entry of judgment, is less than the sum or amount of the judgment entered herein against said defendant, Leonard Woodruff, then and in such event the said judgment entered herein

may be modified and reduced in amount by said Judge of said Court to such sum as the said Judge of this Court may find from such evidence, as aforesaid, together with costs as in said judgment stated, and any additional costs which the Court may find proper, and with interest thereon, and it was further stipulated between the said respective counsel representing plaintiff and said defendant Woodruff that plaintiff waives as against said defendant Woodruff his claim to exemplary and punitive damages of $150,000.00 set up in his first cause of action in his complaint, page 22, paragraph XV, lines 6 to 9, and his claim for damages of $100,000.00 for loss of rights and profits in his complaint on page 24, paragraph III, lines 21 to 24, and his claim for exemplary and punitive damages of $150,000.00 in his second cause of action in said complaint, page 24, paragraph IV, lines 26 to 30, and the claim for punitive damages in the sum of $150,000.00 set up in the third cause of action, page 28, paragraph IV, lines 11 to 14, and that such exemplary or punitive damages shall not be considered by the Judge in ascertaining the value of the said property, and notice of such hearing having been expressly waived.

It is the intent and purpose of this order that such competent evidence as either party desires to present be received by the said Court at said hearing and considered by it in determining the actual value of the property which the plaintiff alleges was converted by the defendants.

Now, Therefore, It Is So Ordered.

Dated: June 8, 1939.

GEO. COSGRAVE,

District Judge.

Referee's Certificate on Review.

To the Hon. Eugene Rice, District Judge:

154 I, Geo. F. Clark, Referee in Bankruptcy, do hereby certify that in the course of this proceeding an order was made disallowing the unsecured claim of M. E. Heiser, a copy of which order is hereto attached.

Petition for Review of said order was filed by M. E. Heiser.

A claim was filed by said M. E. Heiser against the bankrupt estate in the sum of $278,631.71, the consideration as set forth in the proof of debtor being: "Liability for obtaining property of affiant consisting of rough sapphires, opals and zircons of the value of $184,000.00, by false pretenses and false representations through willful, wrongful and fraudulent conversion thereof on May 13, 1929, together with interest thereon, at the rate of 7% per annum, amounting to $113,036.71 and costs of $1,595.00 fixed by and reduced to judgment in the District Court of the United States in and for the Southern District of California, Central Division, made, entered and filed in said County on March 20, 1939, in favor of M. E. Heiser, deponent herein, as plaintiff, and against Leonard Woodruff, bankrupt herein, as defendant, certified copy of which judgment of said United States Court is marked Exhibit 'A', is hereto annexed and referred to as a part hereof." A supplement to proof of claim of M. E. Heiser was thereafter filed.

Objections to claim of M. E. Heiser were filed by Leonard J. Woodruff, debtor, a petition for arrangement made under Chapter 11 having been filed by said Woodruff and an order made staying administration. Objections to the Heiser claim were also filed by Wille May Woodruff,

Ida Belle Woodruff, Howard W. Woodruff, Margueritte B. Woodruff, and Leonard Woodruff, Jr., creditors. Answers to the objections were filed by M. E. Heiser. Amendments to their objections to Heiser claim were filed by Ida Belle Woodruff and Wille May Woodruff.

The questions presented on this review are:

1. Does the default judgment of March 20, 1939, against Leonard Woodruff in favor of M. E. Heiser, the judgment of September 26, 1939, denying the Motions of P. M. Jackson, Trustee in Bankruptcy, and Leonard Woodruff, Debtor, and the decision of the Circuit Court of Appeals affirming the judgment of September 26, 1939, prevent the Bankruptcy Court from considering the underlying claim of M. E. Heiser and allowing or disallowing in whole or in part the claim of said M. E. Heiser as filed in the bankruptcy court?

155 2. Is the evidence produced by the objectors in opposition to the claim of M. E. Heiser sufficient to defeat such claim?

RES ADJUDICATA.

The original suit of Heiser vs. Woodruff *et al* was filed in the California Court on July 11, 1935. Woodruff was served with summons on January 31, 1939 and on the 23rd day of February, 1939, the default of Woodruff was entered by the Clerk of said Court.

On March 20, 1939, the judgment which is the basis of the Heiser claim was entered and on March 29, 1939, a Motion was filed by Woodruff to set aside the default judgment, and on June 8, 1939, an order was made denying Woodruff's Motion but providing that hearing be held to determine value of the property (gems); on June 29, 1939,

the value of the property was fixed at the amount fixed in the judgment.

On July 5, 1939, Woodruff filed voluntary petition and was adjudged bankrupt the same day.

On August 23, 1939, upon application of P. M. Jackson, Trustee of the estate of Leonard J. Woodruff, bankrupt, an order was made by the Referee in Bankruptcy authorizing and directing said Trustee to take such action as might be necessary to have set aside the default judgment.

On the 28th day of September, 1939, the Motion of the Trustee was denied as was also the Motion of Leonard J. Woodruff. An appeal from the order of June 29, 1939; and from the order of September 26, 1939, was taken and Circuit Court of Appeals of the Ninth Circuit dismissed the appeal as to order of September 29, 1939 and affirmed the order of September 26, 1939. The decision of the Circuit Court of Appeals is reported in 111 Fed. (2d) 310.

Objectors' Exhibit DD, 7-27-42, is a certified transcript of Record, upon appeal from the District Court of the United States for the Southern District of California, Central Division, in No. 9356 United States Circuit Court of Appeals for the Ninth Circuit, P. M. Jackson, Trustee in Bankruptcy of the estate of Leonard Woodruff, a Bankrupt, and Leonard Woodruff, appellants, vs. M. E. Heiser, appellee.

156 This Transcript of Record (Ex. DD) apparently is a complete record of the proceeding in which Heiser obtained the default judgment and also the proceeding in connection with the Motion of P. M. Jackson, Trustee in Bankruptcy, and Leonard Woodruff.

Objectors' Ex. CC, 7-27-42, is a Reporter's Transcript of Argument on Motion to Vacate Judgment and set aside

Default on September 26, 1939. This is the Motion to set aside default judgment filed by P. M. Jackson, Trustee, and Leonard Woodruff.

Objectors' Ex. RR is a transcript of hearing to determine value of the gems after the entry of the default judgment in favor of Heiser, against Woodruff.

UNDERLYING CLAIM.

Objectors produced a large amount of evidence in support of their objections. Depositions of numerous witnesses were taken. The claimant offered no evidence on this point but relied on his judgment.

M. E. Heiser came to San Francisco from Australia the end of 1914 or the early part of 1915 on account of the Panama Pacific Exposition at San Francisco.

According to the testimony of M. E. Heiser the uncut gems ($164,000.00) of uncut sapphires, etc.) were brought to San Francisco in 1915 or latter part of 1914 and amounted to several tons. Heiser testified at the hearing to re-determine value in Heiser v. Woodruff in the District Court of California: "I represented the Queensland Government at the Panama Exposition as their expert cutter for demonstration in 1915 in San Francisco cutting to demonstrate how the gems were cut and how they were mined." In his deposition in this proceeding he stated that he was not the official representative of any Government.

The depositions of three Australian officials were taken by objectors. As shown by these depositions Heiser was not an official representative of the Australian Government nor of any State Government of Australia. That
157 Heiser obtained permission to operate a small lapidist's bench in the Australian Pavilion. That

"one of the conditions of Mr. Heiser's tenancy at the Australian Pavilion was that no articles were to be sold by him therein. As Mr. Heiser persisted in selling at his bench gemstones (chiefly rough potch opals), the *Australian* Commissioners withdrew his permit to exhibit within the Australian Pavilion."

Heiser had his space in the Australian Pavilion about a week.

According to Heiser's testimony when he discontinued operations at the Exposition the cheaper material was stored in warehouse and other places and the better materials in the Wells, Fargo Bank in San Francisco.

All this material according to Heiser's testimony (being the $164,000.00 worth of uncut sapphires) remained in San Francisco in warehouse or Wells Fargo Bank until 1928 when it was shipped to Los Angeles. In Los Angeles it was stored in U. S. National Bank, Los Angeles, and none of the material was removed by anyone until it was removed under attachment in case of Woodruff vs. Golden State Gem Company.

Heiser went to Los Angeles in July, 1928, and shortly thereafter met Woodruff through one Calvin Smith who was connected with the Golden State Gem Company of California, a California Corporation. The Golden State Gem Company of Nevada, a Nevada, Corporation, was thereafter organized. Woodruff appears to have owned no stock in either of these corporations. Woodruff did loan $10,000.00 to Smith in addition to amount then owing to him by Smith.

Heiser in August, 1928, left Los Angeles for Europe and did not return to Los Angeles until September or October, 1930.

In 1929 Woodruff filed suit against Golden State Gem Company of California and Golden State Gem Company of Nevada and the material in the U. S. National Bank was attached. The material was contained in thirty six (36) sacks. At the sale Woodruff bought thirty five (35) sacks for $1000.00. One sack was purchased by Louis Oreck for his son. Oreck testified that he selected what he *though* was the best sack of material but that it proved later to be of no value.

While Heiser was in Europe the Golden State Gem Company of California was adjudged bankrupt. A claim was filed in the bankruptcy court for $30,250.00 in behalf of Heiser by his brother in law, which was disallowed and upon appeal the appeal dismissed.

158 I hand up herewith for the information of the Judge the following papers:

1. Brief of M. E. Heiser on Petition for Review.

The following briefs filed with Referee prior to order disallowing Heiser claim:

2. Brief on behalf of objectors to the claim of M. E. Heiser.

3. Reply brief in behalf of the claim of M. E. Heiser.

4. Petition for review.

5. Copy of order disallowing M. E. Heiser claim.

6. Copy of proof of debt of M. E. Heiser and Supplement thereto.

7. Objections of debtor, Leonard Woodruff, to claim of M. E. Heiser.

8. Answer to objections of Leonard J. Woodruff, by M. E. Heiser.

9. Objections of Wille May Woodruff to claim of M. E. Heiser, and Amendment thereto.

10. Answer of M. E. Heiser to objections of Wille May Woodruff.

11. Objections of Ida Belle Woodruff to claim of M. E. Heiser and Amendment thereto.

12. Answer by M. E. Heiser to objections of Ida Belle Woodruff.

13. Objections of Howard Woodruff to claim of M. E. Heiser.

14. Answer of M. E. Heiser to objections of Howard Woodruff.

15. Objections of Margueritte Woodruff to claim of M. E. Heiser.

16. Answer of M. E. Heiser to objections of Margueritte Woodruff.

17. Objections of Leonard Woodruff, Jr., to claim of M. E. Heiser.

18. Answer of M. E. Heiser to objections of Leonard Woodruff, Jr.

19. Transcript of Hearing before Referee on objections to Heiser claim.

The following depositions taken in behalf of objectors:

20. Deposition of M. E. Heiser.

21. Deposition of D. K. Stern.

22. Deposition of E. A. Lobree.

159 23. Deposition of Jefferson J. Graves.

24. Deposition of C. N. Olson, H. A. Dewing, C. W. McClain, J. A. Seelye, Francis B. Cobb, John Greble Moran, Gean Kosto, Howard L. Woodruff, Charles B. Marlatt, Norman R. Dunn, Louis Oreck, and Claire E. Cone.

The following three (3) depositions were taken in Australia:

25. Deposition of Leo Joseph Jones.

26. Deposition of Adolphus Arnold Staines.

27. Deposition of David Barnett Edward.

28. Exhibits.

Dated at McAlester, said District, this the 28th day of January, 1944.

Respectfully submitted,

GEO. F. CLARK,
Referee in Bankruptcy.

Filed Jan. 29, 1944, John H. Pugh, Clerk, U. S. District Court.

Order Authorizing and Directing Trustee to Institute Legal Actio to Vacate and Set Aside Judgment of M. E. Heiser Against Bankrupt.

Now on this 23d day of August, 1939, there having been presented to the court the application of the trustee for authority to institute *legal action* to vacate and set aside judgment of M. E. Heiser against bankrupt and for authority to employ counsel to represent said bankrupt in said matter, and there also being presented an application of creditors other than M. E. Heiser, requesting that this court direct the trustee to take said legal steps, and the court after being fully advised in the matter, finds that a default judgment was rendered in the United States District Court in and for the Southern District of California, Central Division, in which M. E. Heiser was plaintiff and the bankrupt, Leonard J. Woodruff, was defendant, same being case No. 7256-C in said court, and said judgment being for the sum of $278,621.71.

The court finds that said judgment represents a large part of indebtedness of the bankrupt herein and that said judgment being rendered by default, that the matters and things that the bankrupt claims to be a complete defense to said action has never been presented to the court, and in the judgment of this court the merits of said matter and legality of said judgment should be inquired into by court of proper jurisdiction.

The court further finds that the time within which trustee may legally attack said judgment will expire on or about September 20, 1939, and for said reasons, prompt and immediate steps should be taken to test the legality of said judgment, and that said trustee should be ordered and directed to take such legal steps as may be proper to vacate, set aside or to avoid said judgment.

The court further finds that the litigation necessary to test said judgment will necessarily have to be conducted in the state of California where said judgment was rendered and that the trustee should be authorized to employ a capable and reputable attorney who is familiar with the practice in the state of California and who is located in Los Angeles where said judgment was rendered in order to minimize the expense as much as possible, and said trustee has applied to this court for authority to employ Francis B. Cobb, attorney of law of Los Angeles, who is reputed to be a capable and experienced practitioner of the law in California, and the court finds that said Francis B. Cobb is not disqualified to represent said trustee and that he represents no interest that would conflict with his duties for said trustee in this matter, and that he should be employed as attorney for the trustee in this matter.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the trustee, P. M. Jackson, be and is hereby authorized and directed to take such legal steps as may be proper and necessary under the law to vacate, set aside and to avoid the judgment of M. E. Heiser against the bankrupt, Leonard J. Woodruff, rendered in the United States District Court in and for the Southern District of California, Central Division, said case being No. 725-C in said court.

It is the further order and judgment of the court that said trustee be authorized to employ as his counsel in this matter Francis B. Cobb, a member of the firm of Cobb, Campbell, & Kelly, attorneys of Los Angeles, California.

GEO. F. CLARK,
Referee in Bankruptcy.

Filed Aug. 23, 1939. Geo. F. Clark, Referee.